arguments of TBF and the Bureau are inconsistent with the Presiding Judge's reading of the case, our reading of the case and ignore the major differences between the applications in Integrated and the applications in this case.

33. The Review Board's treatment of the allocation issue is quite brief. In its entirety, it reads as follows:

> 2. The largest single item of expense is $8,664.84 for legal fees. At or about the same time as United Artists Broadcasting filed its application for a new station in Boston, it filed applications for Houston, Texas, and Cleveland, Ohio. The Cleveland, Ohio application was subsequently amended to specify Lorain, Ohio. The figure for legal fees was arrived at by taking one-third of the total billing for legal service in connection with all three applications. The Broadcast Bureau in its opposition argued that this figure was not properly identified with costs in connection with the preparation and prosecution of United Artists Broadcasting's Boston application. United Artists Broadcasting submitted a second affidavit from counsel with its reply, which alleged that the time records had been searched and that one-third of the total costs was a proper allocation, and that the figure $8,664.84 had in fact been expended in connection with the Boston application...
>
> 5. With respect to the showing concerning legal fees, the Board is persuaded that the distribution of charges submitted by United Artists Broadcasting, Inc., supported by the affidavits of Messrs. Plotkin and Bechtel, is appropriate.

5 RR 2d at 726-727. The important holding of Integrated is that there must be a relationship between the breakdown of expenses and the work that was actually done. The first affidavit submitted by the attorneys for the applicant reflected a linear arithmetic pro-rata allocation. The Hearing Division of the

Commission's Broadcast Bureau was not satisfied with that. The second affidavit of the attorneys for the applicant was based upon the work that was actually done as determined by a review of the time records. The Commission's Review Board was satisfied with that. That such analysis happened to arrive at the same result as the linear arithmetic allocation was beside the point.

34. TBF and the Bureau are arguing that Raystay should have done what the Board specifically rejected in Integrated - take a pro rata share without evaluating the work that was done. Mr. Berfield, on the other hand, took into account the work that had been performed in deciding what percentage of the expenses could be claimed for Red Lion. As noted above, the Presiding Judge has already ruled the standard for evaluating the certification is the relationship between the expenses and the work done - the same standard that was used in Integrated.

35. While it is true that one-third of the total expenses were allowed in Integrated, that does not mean it would be improper to take some other percentage so long as the work justified it. There is clearly no statement in Integrated that requires such a result in other cases. Moreover, the types of applications at issue are very different. The Integrated applications were customized Form 301s with different ascertainment and programming proposals for each community. Tr. 5412. The non-engineering portions of the applications and amendments in issue here are largely identical. See TBF Exs. 203-207, Glendale Ex. 224 at 7-8. Thus, Integrated cannot be

said to prohibit what Mr. Berfield did and actually supports what he did.

36. In addition to Integrated, TBF cites a handful of decisions in its proposed conclusions relative to reimbursable expenses. None of the citations supports TBF's arguments relative to Glendale in the matter:

(a) Urban Telecommunications Corp., 7 FCC Rcd. 3867, 3870 (1992), (b) Scott & Davis Enterprises, Inc., 54 RR2d 868, 869 (1983), and (c) Calhoun County Broadcasting Co., 57 RR2d 641, 646 (1985), TBF Conclusions at 501, relate to settlement policies in the initial application processing stage and do not relate to the reimbursement issue here.

(d) Amendment of §73.3597 of the Commission's Rules, 52 RR2d 1081 (1982), on recon., 99 FCC2d 971 (1985), Comparative Broadcasting Proceedings, 6 FCC 85 (1990), on recon., 6 FCC Rcd. 2901 (1991), and Report and Order (Low Power Television Service), 51 RR2d 476, 517 (1982), TBF Conclusions at 502-03, all relate in one way or another to the concept and regulatory value of the "no-profit" rules, which apply both to construction permits and application filings, with which we have no quarrel.

37. TBF lists five decisions relative to the Commission's examination of expenses in reimbursement decisions. TBF Conclusions at 503-04. One is the Integrated decision which we have already discussed. The other four are as follows:

(a) Horseshoe Bay Centex Broadcasting Co., 5 FCC Rcd. 7125, 7128 (1990). This case, like a number of Commission cases,

disapproved a consultancy agreement over and above reimbursement of out-of-pocket expenses in the sale of a construction permit. Such agreements can tend to be a cover for a profit, and have rarely been approved in this situation. Nothing of this nature has been included in the Red Lion assignment.

(b) Community Telecasters of Cleveland, Inc., 43 FCC2d 540, 542-43, 28 RR2d 1018 (1973). In this sale of a permit for a UHF station in Cleveland, the reimbursement was reduced from an initial amount claimed of $212,400 to $181,000. The principal reduction in the amount of $30,800 was the withdrawal of two claimed reimbursements the nature of which is not set forth in the opinion. A few hundred dollars were disallowed by the Commission for trade publications and attending trade conventions as too far removed from construction or placing the station on the air. Nothing of that genre has been included in the reimbursement amount involved in the Red Lion assignment.

(c) TVue Associates, Inc., 5 FCC2d 421, 422, 8 RR2d 862 (1966). In this case involving the sale of a construction permit, the Commission disallowed payment of salary to the President, a director and 10% stockholder of the applicant, an expense item which has long been disallowed. Also disallowed were small amounts for subscriptions and attendance at a convention. Neither of these rulings is germane to the Red Lion assignment.

(d) Dirigo Broadcasting, Inc., 4 RR2d 273 (Rev.Bd. 1965) rejected a reimbursement request in the aggregate amount of

$32,000 relative to dismissal of an application for a new television station in Bangor, Maine because of a substantial number of inadequately explained or inadequately segregated costs, e.g., stationery items were listed down to such detail as 78 cents for a package of envelopes, whereas travel and hotel bills to such places as New York, Tampa and Washington were not supported or explained and there were widely differing costs of air fare and hotels, advertising and public relations expenses were claimed for work by the secretary of the applicant's principal, there was a cost item for a speech to the Maine State Legislature, etc. etc. This holding does not relate to the facts and circumstances here, where the specific out-of-pocket costs have been determined with accuracy and the issue relates to the rather esoteric question of the methodology of allocation of those costs in a situation involving multiple construction permits where only one of the permits is being sold.

VI.
RAYSTAY'S LEGAL EXPENSES

38. A more detailed review of Raystay's legal expenses shows why Mr. Berfield's figure was correct. TBF fixates upon the legal invoices and argues that no allocation could be made because the invoices are not broken out by individual permit. Trinity Findings, ¶¶410-411 at 287-288. This argument is just another variation of the argument that the Presiding Judge has already rejected with respect to the Hoover invoice - that the face of an invoice "speaks for itself" and that the Presiding Judge must ignore what work was done. It is immaterial how Cohen

and Berfield worded its bills - what is important is the relationship between the expenses and the work done.

39. For example, with respect to the original bill for $5,200 plus expenses for preparing the five applications, neither TBF nor the Bureau have any basis for challenging that $4,000 of the $5,200 was chargeable to Red Lion because most of the work Mr. Berfield did was on the Red Lion application (the first application). Glendale Ex. 224 at 7-8. It is perfectly obvious from reviewing TBF Exs. 203-207 that once one application was prepared, almost no additional work would be involved in preparing the non-engineering portions of the other applications. Mr. Hoover's transmittal letters establish (Glendale Ex. 224, Appendix C at 27-29) that Mr. Berfield received the Red Lion engineering first.

40. TBF's suggestion that Mr. Berfield's testimony is not credible because he did not mention this detail in opposing TBF's petition to enlarge issues (TBF Findings, ¶410 at 287-288) is nonsensical and also inappropriate brief writing since it is based on an attempted line of questioning that was precluded by a ruling of the Court, i.e.:

> Q (Mr. Holt): And your testimony -- in your written testimony in this case you provided information regarding how you made an allocation of fees among TV 40 and the construction permits with respect to certain legal services that were provided that were shared expenses, correct, and I'll refer you specifically to the --
>
> A. Yes, that's correct. That's correct.
>
> Q. You didn't provide any information about how you had made that allocation in your declaration, did you?

Mr. Bechtel: Judge, I'm going to, I'm going to ask a question. I'm going to ask counsel to explain the relevance. Are we trying --

Judge Chachkin: I'm having difficulty understanding the relevancy.

Mr. Bechtel: -- a misrepresentation in a pleading or referring to a misrepresentation in the certification as originally filed?

Mr. Holt: Well, Your Honor, this declaration purports to explain the facts surrounding how Mr. Berfield arrive at the figures and yet it -- as specified in the Red Lion expense certification, but yet it doesn't provide the facts. It provides an opinion as to the proprietary [sic] of the figures specified. In fact, it doesn't even identify that Mr. Berfield is the individual who calculated the figures. And my -- I guess my question is why.

Mr. Bechtel: And my question is why does that mean a damn thing?

Mr. Cohen [sic] [Judge Chachkin]: How is that relevant, the fact that they didn't provide this information? You're not suggesting that there's any intentional deception in this declaration? What are you suggesting by all this? The fact that obviously they're at hearing now, there's an issue and so, therefore, as I assume all lawyers do, they prepare as complete as they can a direct case. The fact that they didn't prepare a complete -- provide all the information at the time of answering the Petition to Enlarge Issues, I fail to see how that's relevant.

Mr. Holt: Yes, Your Honor. I understand your ruling. Thank you.

Judge Chackin: And obviously when you refer to a declaration presumably the purpose is to show that there's inconsistencies between a prior exhibit and the exhibit being offered, but I haven't seen any of that being attempted here.

Mr. Holt: Your Honor --

Judge Chachkin: Somehow you're only quibbling with, with Mr. Berfield over the fact that his presentation wasn't as complete when he filed his Opposition to the Petition to Enlarge Issues as it is now when he's faced with an issue, but I don't understand how that is

A. Well, as I indicated, when we started out on the project I knew Mr. Hoover had given a fee for each specific site search, Red Lion, Lancaster and Lebanon, and the three that weren't filed on. And I reviewed his work and it appeared to me that one-third of the work was attributable to Red Lion, one-third to Lebanon, one-third to Lancaster, and that -- that's how I did it, but I didn't have Mr. Hoover's bill before me when I did that. I just had the number from Mr. Gardner.

Q. You said that you knew that Mr. Hoover had given a figure early on?

A. Yes.

Q. What do you mean -- what is that all about?

A. Well, when we first started I -- it's my recollection as I got a call back in the fall of '88, maybe November, early November 1988, from Mr. Gardner asking how Raystay could go about possibly applying for low power. At that time, as you know, low power only -- you could only file in certain windows and the Commission's [sic] only opens like one or possibly two windows each year. But when he called there wasn't a window open, but I think we knew that one would be coming up the first of the year, sometime in the first quarter, which is what the Commission normally does. They like to get their backlog caught up and then they open a new window. And Mr. Gardner asked how we go about it and I said I'll get ahold of Hoover and find out and I talked to Mr. Hoover and he said yeah, it will be X dollars, and now it turns out it was $1,000 a site, to find out if your low power channel was available at various, at various locations. So that's how I knew that. I interfaced a little bit between Hoover and Gardner on that.

Q. Let's go back to your conversation with Mr. Hoover early on in 1988, you said?

A. I believe it was.

Q. What is it that Mr. Hoover told you to the best of your recollection about what the charges would be for his services, how he would break those charges down and what those services would include?

A. Well, at that point all we were doing was seeing if there were channels available. There's a frequency search, which in low power you do by site, and Mr.

> Hoover said he would research the sites for X dollars, which we now know was $1,000 a site, and that Mr. Gardner could tell him if he had specific sites in mind. That's about it. I knew what had to be done. I just -- but, I mean, that was about all I can recall of the conversation.
>
> Q. Did he, did he convey to you how much he thought it would cost for him to actually prepare the engineering portion of each CP application?
>
> A. No. We never got into that.
>
> Q. You didn't get that far?
>
> A. No.
>
> Q. So, in other words, your conversation with Mr. Hoover in 1988 related to just the frequency searches and the cost for that?
>
> A. Yes. That's my recollection...

Tr. 5533-35. Mr. Berfield's testimony was supported by documentary evidence consisting of the three frequency study reports for Red Lion, Lebanon and Lancaster referred to in his direct testimony, including transmittal letters from Mr. Hoover to David Gardner, showing copies to Mr. Berfield. Glendale Ex. 224 at 46-75. Neither TBF nor the Bureau offered any rebuttal evidence to dispute this clear and consistent testimony.

(b) In ¶418 at 292, TBF proposes the finding that Mr Berfield "claimed" to have been aware that the engineering portions of two applications for the same site involved less work doing engineering portions of two applications for different sites. Mr. Berfield didn't "claim" to be aware of this...he testified under oath that he was aware of this. Glendale Ex. 224 at 10-11. The hearing record contains copies of the engineering portions of two applications for Lebanon and two applications for

Lancaster which support the accuracy of this testimony. TBF Ex. 203-206. Neither TBF nor the Bureau offered any rebuttal evidence to contradict this clear and consistent testimony.

(c) In ¶418 at 292, TBF proposes the finding that Mr. Berfield "allegedly" was aware that Hoover was responsible for FAA clearance of three sites, not five. There is nothing "allegedly" about it. Mr. Berfield testified under oath that he knew this and gave further details that he knew the Red Lion site was the lead site for clearance of complicated EMI problems. Glendale Ex. 224 at 11. The hearing record contains copies of correspondence between Mr. Hoover and the FAA, much of which is copied to Mr. Berfield, which corroborates this testimony. Glendale Ex. 224 at 76-112. Neither TBF nor the Bureau offered any rebuttal evidence to dispute this clear and consistent testimony.

B.

The Standard for Judging the Expense Certification

11. In their push to argue that Raystay was required to allocate only a pro rata share of the total expenses to Red Lion, both TBF and the Bureau ignore an important ruling by the Presiding Judge which undercuts their argument. Near the end of the hearing, the Presiding Judge held that the reasonableness of Mr. Berfield's allocation would be judged by comparing it to the work performed:

> MR. SCHONMAN: With all due respect, I think the amount of work that Mr. Hoover may or may not have performed is really not an issue. It's the amount of expenses that Raystay incurred with respect to the Red Lion C.P.

> relevant to the trial of the issues in this case. If there are [sic] any inconsistency you certainly have a right to point it out.
>
> Mr. Holt: Thank you, Your Honor.

Tr. 5432-33.

41. With respect to legal fees other than for the initial preparation of the five applications, the record fully supports Mr. Berfield's analysis that up to ninety percent of the total fees could have been attributed to Red Lion or any other of the permits because virtually the same amount of work would have been required whether there was one construction permit or five. Amendments of the applications were identical except for channel number, community of license and file number. Glendale Ex. 224 at 8. With respect to those amendments, virtually the same amount of work would have been necessary in connection with the "preparing, filing and advocating the grant of" one construction permit as was required for five. The same can be said for the consultations with Commission staff advocating grant of the applications - the same meetings would have been required for one application as for five. Id. With respect to the May 6, 1991 and June 5, 1991 bills (Glendale Ex. 224 at 23-24), the LPTV agreements in question were essentially identical (Compare TBF Exs. 218-221 and Glendale Ex. 224, Appendix D), and there was negligible additional work involved in reviewing five agreements as opposed to one. Glendale Ex. 224 at P. 9.

42. TBF argues that certain work reflected in one of the two June 4, 1990 invoices (Glendale Ex. 224 at 19) and the

November 9, 1990 invoice (Id. at 22) had nothing to do with the LPTV construction permits and should not have been included in Raystay's total legal fees for the five LPTV stations. TBF Findings, ¶413 at 289. TBF ignores Mr. Berfield's testimony explaining how the matters related to the construction permits and were reimbursable expenses under the rule. Glendale Ex. 224 at 4-5. That testimony was not impeached or rebutted:

> Q. (Mr. Schonman): Share with us the substance of that second discussion with Mr. Berfield.
>
> A. (Mr. Sandifer): Mr. Berfield just outlined some of the types of legal costs that he thought were attributable to this process and that he felt that there was the ability to allocate those costs to certain permits in, in a reasonable manner.
>
> Q. Well, did you tell him that you, it was your understanding from David Gardner's hand written note that the legal expenses totaled about $5,000?
>
> Judge Chachkin: Now, wait a minute. He never said that. It was his opinion when Mr., when Mr. Gardner gave him his figures that this counts as partial expenses. He never said these were total legal expenses. I mean, as far as I know, there's no evidence in the record that the $15,000 that Cohen and Berfield claimed as their legal expenses wasn't, in fact, occurred. This counts as partial expenses based on invoices which they had up to that time. The subsequent letter includes a [sic] total expenses. Now, do you have any evidence to the contrary, please tell me about it.
>
> Mr. Schonman: Very well, Your Honor.
>
> Judge Chachkin: Well, stop spending [sic] this, as far a I know, there's no, we do have the invoices of Mr. Cohen, we do have his statements. They add up to what they add up to. We were talking about the allocation. As far as I know, there's been no questions raised by anybody, including TBF, that Mr. Cohen, in fact, did not incur, that thaat was not the legal costs of $15,000.

> Mr. Schonman: Your Honor, if I could have a moment just to go over my notes.

Tr. 5597-98.

43. The June and November 1990 invoices were for services in the development and initial implementation of a compliance program for Raystay's LPTV stations. In order to get the Red Lion and the other LPTV applications granted, Raystay was required to pledge to the Commission that it would "devise a compliance program which will ensure that Raystay's operation of its low power television stations is strictly in compliance with all Commission rules and regulations." TBF Ex. 260 at 2. The five then-pending applications for low power television permits were the only vehicle for George F. Gardner to make presentations to the Commission to establish his qualifications and have consultations with the Commission's staff regarding the matter. Glendale Ex. 224 at 4; Tr. 5649-50. Accordingly, the submission of information regarding that program was absolutely required in order to secure a grant of the construction permits, and the work in discussing the compliance program with the Commission, and persuading it to grant the applications in light of the representation that the program would be developed, was advocacy of the grant of the construction permits.

44. The work in developing and initially implementing the compliance program for TV40 was a step reasonably necessary toward placing the Red Lion station in operation in two respects. First, the development and implementation of the compliance program was a condition of the grant of the Red Lion application,

so Raystay was complying with a condition necessary to construct and to operate Red Lion in compliance with Commission rules. Tr. 5485-5486. Second, a compliance program was going to have to be implemented for Red Lion, so the development of a program for TV40 was a prototype for the permits that would be applied as they were built. Tr. 5489-5490. Clearly, the initial compliance program work fell within the rule's definitions of reimbursable expenses.

45. Mr. Berfield testified that he allocated fifty percent of the LPTV construction permit fees to Red Lion because he was being conservative and because only $10,000 needed to be justified. Tr. 5516, 5518-5519, 5524-5525. TBF argues that this testimony shows that Mr. Berfield's figure:

> was not derived from any rational analysis of Raystay's fees; it was employed simply to produce a total cost figure that would exceed Raystay's $10,000 sale price for the permit.

TBF Findings, ¶414 at 290, see also Bureau Findings, ¶343 at 178. This is nonsense. Mr. Berfield performed a rational analysis of all legal and engineering fees and costs for all five construction permits in relation to a total "sales price" target figure of $30,000. When it came time to allocate a sum to the first permit to be sold, with a target price of $10,000, Mr. Berfield performed a second rational analysis of amounts reasonably allocated to that permit. This analysis yielded the desired amount based upon a conservative allocation of the legal figure, and so he went with that conservative allocation. This was a careful, detailed and thoughtful analysis. It was not

plucking a figure out of the air or otherwise arbitrarily picking a figure to match the target price.

46. There is no basis whatsoever for concluding that the certification of legal expenses was false.

VI.
RAYSTAY'S ENGINEERING EXPENSES

47. Glendale has already shown above that the arguments of TBF and the Bureau concerning the allocation of Raystay's engineering expenses are based upon the Hoover invoice, which the Presiding Judge has already ruled is incompetent to show the existence of any "allocation" by Mr. Hoover or to show that Mr. Berfield's allocation is improper. ¶13. TBF and the Bureau also ignore the fundamental point that once the $1,000 payment for the Red Lion frequency study is taken into account, Raystay could have claimed $2,525 in engineering expenses under TBF's and the Bureau's own theory (or $100 more than was actually claimed). ¶14.

48. The findings of TBF and the Bureau -- concerning Mr. Berfield's reasoning for allocating one-third of the engineering expenses of which he was aware to Red Lion -- are incomplete. See TBF Findings, ¶¶417-418 at 291-292, Bureau Findings, ¶262 at 131. Mr. Berfield's reasoning was considerably more detailed than TBF and the Bureau make it out to be. In fact, he had several reasons for his conclusion based upon the work Mr. Hoover did: (1) the fact that Mr. Hoover performed frequency allocations on a site basis (which Mr. Berfield understood at the time to be included in the $7,275 figure he had), (2) the performance of FAA

work, which was done on a site basis and for which Red Lion was the lead site, and (3) the fact that preparing the engineering portions of two applications for Lancaster or Lebanon involved less work per application than one application for Red Lion. See Glendale Findings, ¶¶27-34 at 17-22. Neither TBF nor the Bureau have offered any competent evidence undercutting Mr. Berfield's testimony.

49. There is no basis whatsoever for concluding that the certification of engineering expenses was false.

VII.
THE FORM OF THE EXPENSE CERTIFICATION

50. TBF and the Bureau argue that Raystay should have disclosed in its certification that the expense figures were based upon an allocation and that Raystay lacked candor by not disclosing that fact. TBF Findings, ¶¶422-429 at 295-300, TBF Conclusions, ¶734 at 509, Bureau Conclusions, ¶347 at 180. Both TBF and the Bureau have failed to cite any rule, regulation, policy statement, application form or instructions relative to an application form that requires this. Moreover, the figures were accurate, so no motive can be found for Raystay to hide that information. Indeed, Raystay could not have hidden from the Commission the fact that several construction permits were involved because that fact was readily apparent from the Commission's own files. These and related matters have been set forth in our opening proposed findings and conclusions, ¶¶59-65 at 34-37, and will not be repeated. We respond to three items here.

51. First, TBF writes in ¶429 of its proposed findings (at 300) that Mr. Berfield "clearly knew that the allocations were relevant to the FCC's assessment of the application" because he retained his original worksheet in case the Commission requested further information. What nonsense. Careful applicants and their counsel keep drafts, worksheets and other backup materials regarding FCC applications all the time. This doesn't mean they believe they should have filed such materiel with the FCC application. This is a prudent thing to do in case there is any question about the filing which such notes might be useful in answering. And when the application has been granted and the party and its counsel move on to other things, many such notes, worksheets and the like are discarded. There is nothing wrong with this either. We are dealing with the standard operating procedure of lawyers all over the city. The hearing record reflects that this normal operating procedure is what happened here -- nothing more, nothing less.

52. Second, TBF challenges the credibility of Mr. Berfield's explanation that he expected that Grolman's counsel would prepare the expense certification. TBF Findings, ¶427 at 297-298. The alleged contradiction between Mr. Berfield and David Gardner does not exist. As Glendale has noted above, the fact that David Gardner does not recall something Mr. Berfield remembers does not mean that the event did not happen, especially since David Gardner candidly admits he has little recollection concerning the certification. Glendale Ex. 227 at 3.

Furthermore, TBF distorts the record by comparing two different time frames. The conversation with David Gardner that Mr. Berfield discussed took place in late November or early December 1991. Glendale Ex. 224 at 7, Tr. 5407. The first notice David Gardner had that Arent, Fox expected Raystay to prepare a certification of expenses was the December 12, 1991 letter from David Tillotson. See TBF Ex. 275 at 2. Indeed, Mr. Tillotson prepared most of Raystay's portion of the assignment application. TBF Ex. 275 at 1.[5] It is certainly consistent for David Gardner to be operating under the belief before receiving the December 12 letter that Arent, Fox would prepare the expense certification (since they prepared other portions) and that after receiving the December 12 letter, he knew Cohen and Berfield would have to prepare the certification. Like TBF's other proposed inconsistencies, this inconsistently does not exist.

53. Third, the fact that the applicant in the Integrated case disclosed that an allocation was made did not put Mr. Berfield on notice that Raystay was required to notify the Commission in this instance. Integrated was over twenty-five years old when Mr. Berfield conducted his research. The application requirements for FCC Form 301 in 1965 were much more extensive than the disclosure requirements for FCC Form 345 in

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[5] TBF's reliance on TBF Ex. 272 is misguided for two reasons. First, the letter clearly does not say that Grolman's lawyers were not going to be involved in preparing Raystay's portion of the application - they were. Second, there is no evidence that David Gardner ever saw the letter, which was addressed to Mr. Sandifer, or discussed it with anyone.

1991. Moreover, if a lawyer were researching what information an application required (as distinguished from the law relative to allocations among multiple applications), the current rules and application form instructions would be the appropriate matters to rely upon, not a case from 1965 involving a completely different form. In light of the Integrated case, the Commission knew that allocations were sometimes made in calculating reimbursable expenses. It never amended the application instructions or rules, however, to require the disclosure of allocations.

VIII.
NO INTENT TO DECEIVE

54. Since the expense figures in the certification were correct, and since Raystay had no obligation to report the fact that an allocation was used, there was no misrepresentation or lack of candor in the Red Lion assignment application. Even if the certification were incorrect, however, no misrepresentation or lack of candor can be found in the absence of any intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC2d 127, 129, 53 RR2d 44, 46 (1983); Gross Broadcasting Co., 41 FCC2d 729, 730-731, 27 RR2d 1543, 1545 (1973); Cannon Communications Corp., 5 FCC Rcd. 2695, 2705 n.18, 67 RR2d 1159, 1166 n.18 (Rev.Bd. 1990).

55. As we consider the erronous analysis of TBF on this score, TBF Conclusions ¶¶733-742 at 508-514, let's start with the alleged falsity of the information in the Red Lion application. TBF's claim that David Gardner, Mr. Sandifer and Mr. Berfield knew "the certification contained false statements and withheld

material information" (TBF Conclusions, ¶736 at 510) is totally contrary to the record. Mr. Berfield diligently researched his firm's invoices and time records, searched for available precedent, and considered the matter carefully before reaching his conclusions. Moreover, both David Gardner and Mr. Sandifer acted in the utmost good faith and had no reason to believe that the certification was inappropriate.[6] David Gardner asked counsel whether Raystay could justify the $10,000 sales price, and Mr. Berfield told him what figures Raystay could claim. David Gardner had no reason to question that advice. Mr. Sandifer knew that counsel had approved the figures in the certification before he signed the application. Tr. 5577. Moreover, Mr. Berfield had told Mr. Sandifer that expenses could be allocated. Tr. 5581, 5602-5603.[7]

56. Neither David Gardner nor Mr. Sandifer had any reason to believe that the certification was supposed to specifically mention the fact of an allocation. Indeed, no such requirement exists in the Commission's rules or in the application form.

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[6] TBF and the Bureau emphasize that Mr. Sandifer agreed upon a price of $10,000 before knowing what Raystay's specific expenses were. TBF Findings, ¶¶389-390 at 276-277, Bureau Conclusions, ¶343 at 178. As Mr. Berfield testified, based on 30 plus years experience in the private practice of communications law, there is nothing untoward about that procedure. Glendale Ex. 224 at 2.

[7] In ¶406 of its proposed findings (Pp. 284-285), TBF emphasizes Mr. Sandifer's testimony that he was uncertain whether Mr. Berfield told him whether there was a "legal basis" for making allocations. TBF is engaging in semantic game playing. Mr. Sandifer made clear in his answer that Mr. Berfield told him "that he thought allocations were appropriate." Tr. 5603.

Furthermore, TBF's argument that Grolman's comments and the Integrated case put Raystay on notice that the allocation was improper (TBF Conclusions, ¶¶731-732 at 506-507) is baseless for the reasons noted above. There were no false statements in the Red Lion assignment application. There is no misrepresentation or lack of candor to attribute to anyone, whether it be Glendale, Raystay, George Gardner, David Gardner, Mr. Sandifer or Mr. Berfield.

57. TBF argues that George Gardner is responsible for the performance of his agents. TBF Conclusions, ¶736 at 510-511. George Gardner delegated detail responsibilities for the negotiation and effectuation of the sale of the Red Lion construction permit to Mr. Sandifer, to David Gardner and to his communications counsel of some 30 years. In his absence at the time the assignment application was signed, the expense certification was prepared by communications counsel and the application was reviewed and signed by Mr. Sandifer and David Gardner. This was done in a competent, effective and honorable way, as has now been demonstrated through the mechanism of an adversary evidentiary hearing. George Gardner was well served in the delegations of responsibility that he made in the matter of the Red Lion assignment application.

58. But even if there had been some false statement in the application (which were wasn't), it is not accurate to say that George Gardner or Glendale should be penalized in this proceeding for any such false statement (if it had been made, which it

hasn't). Since George Gardner is the common link between Raystay and Glendale, Glendale cannot be disqualified in the absence of evidence that George Gardner acted with an intent to deceive the Commission. And yet, TBF has never alleged that George Gardner had knowledge of the details of the expense certification of Raystay which TBF claims contained false statements. The Bureau recognizes this principle and concludes that the issue must be resolved in Glendale's favor because George Gardner had no role in preparing, reviewing or signing the Red Lion assignment application. Bureau Conclusions, ¶348 at 181.

59. TBF accuses George Gardner of ignoring his pledge to the Commission to review applications and appears to suggest that that failure to do so provides a basis for disqualification. TBF Conclusions, ¶¶737-741, Pp. 511-513. TBF's argument is outside the scope of the designated issue, which is to determine whether there were misrepresentations or lack of candor in the Red Lion assignment application, and, if so, the effect on Glendale's qualifications. The Presiding Judge rejected TBF's request for an issue to determine whether George Gardner misrepresented to the Commission that "he would take steps to ensure accuracy and compliance in all dealings with the Commission." Memorandum Opinion and Order, FCC 93M-469 (released July 15, 1993) at ¶22. Glendale cannot be disqualified because George Gardner did not review the application - there must be a showing that he misrepresented facts or lacked candor.

60. This argument, like many other arguments made by TBF, also ignores the facts. George Gardner's failure to review the application was in no way inconsistent with his pledge to the Commission. He pledged the following to the Commission:

> While I never intended to deceive the Commission, I now realize the importance of being absolutely candid in applications and statements made by me to the Commission, and have resolved to carefully review any such applications and statements to ensure that they fully and accurately disclose any pertinent facts.

TBF Ex. 258 at 3 (emphasis added). Since George Gardner had not been personally involved in preparing the Red Lion assignment application, the statements therein were not made "by him", and his pledge was therefore not applicable.

61. This does not reflect any cavalier attitude by George Gardner regarding his pledge to the Commission. This reflects that in the instance of this particular application, George Gardner was out of town. Nothing more and nothing less. He left the matter in the hands of employees and agents who acquitted themselves fully and served him well. With regard to his pledge to the Commission, this record shows that George Gardner established and carried out a policy that if he is in the office, any application must be sent to him for review and signature. Tr. 5613. No evidence exists that when he went away, George Gardner knew the application was going to be filed in that period. If he had been in the office when the Red Lion assignment application was ready to be signed, he would have reviewed and signed it. Glendale Ex. 226 at 2. Moreover, given

what he knows now, he believes David Gardner and Mr. Sandifer acted appropriately. Glendale Ex. 226 at 2-3. In essence, TBF wants to disqualify George Gardner because he happened to be out of town when David Gardner and Lee Sandifer completed the assignment application.

62. None of the cases and precedent cited by TBF supports its erroneous analysis in the proposed conclusions. Each will be discussed in turn:

(a) WHW Enterprises, Inc. v. FCC, 758 F.2d 1132, 1139 (D.C. Cir. 1985), TBF Conclusions at 508: This case involved a party, Mr. Popke, in a comparatitve hearing who had sold a radio station, which he formerly owned, to another company taking back a purchase money promissory note. This radio station was located in the same market as the new station for which Mr. Popke and others were in a comparative hearing. The competing applicants argued that the purchase money note was the principal asset of Mr. Popke, that he therefore was personally affected by the operation of the station he had sold, and that therefore a grant of the new station to him would involve less of an independent new license holder than a grant to the competing applicants. Mr. Popke denied that the purchase money note was so important to his economic position, falsely stating that he owned certain property which in fact was owned by his sisters. It then developed that he had transferred that property to his sisters in order to keep it from his creditors. While Mr. Popke undertook to explain to the Commission that he did this for the benefit of his creditors,

the Commission and the reviewing Court gained the impression that this was more in the nature of a fraud upon the creditors. However that may be, there was a direct, highly material and false statement made by Mr. Popke which he knew was false designed to defeat a comparative argument against him for which there were no extenuating, innocent facts and circumstances. This case stands for the general principle that a misrepresentation to the Commission is ground for denial of an application, a general principle which no one disputes. On the facts, it does not remotely resemble the record here.

(b) Character Policy Statement, 102 FCC2d 1179, 59 RR2d 801 (1986), TBF Conclusions at 508, 510-11 and 513: This Commission document also contains certain statements of principle which no one disputes: that a misrepresentation to the Commission by an applicant is a serious matter and could be ground for disqualification (59 RR2d at 823); that the Commission examines the facts in a case to determine if the misrepresentation is sufficiently egregious to merit disqualification or if it is what the Commission calls an "immaterial misrepresentation" (59 RR2d at 823); that a corporate applicant is responsible for the misrepresentations made by its employees (59 RR2d at 827); and that as a general rule, misrepresentation relative to one station is not attributable to another commonly owned station unless there was a misrepresentation as to the second station as well (59 RR2d 831-32). A reminder of these general principles, while always of benefit, does not advance the cause here except for the